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In the

Supreme Court of the United States.

October Term, 1935.

No. 715.

The Atlantic Lumber Company,
Appellant,

v.

Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts,
Appellee.

BRIEF FOR APPELLANT.

ROBERT C. McKAY,
Attorney for Appellant.

Rockwell & Churchill Press, Boston.

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In the

Supreme Court of the United States.

October Term, 1935.

No. 715.

THE ATLANTIC LUMBER COMPANY,
Appellant,
v.
COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS,
Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

(a) *General.*

This is an appeal from an order of the Supreme Judicial Court of the Commonwealth of Massachusetts affirming a decision of the Massachusetts Board of Tax Appeals in an appeal from the refusal of the Commissioner of Corporations and Taxation to abate an excise tax assessed to the appellant for the year 1932 under the provisions of sections 39-43 of chapter 63 of the General Laws of the Commonwealth of Massachusetts (App. p. 41). In this appeal it was contended by the appellant that said chapter 63 did not apply to its business and that, if so construed, it was invalid as a burden on interstate commerce in violation of

section 8 of article I of the Constitution of the United States, and also invalid as depriving the appellant of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States (Contentions of Law 1, 2, 3, 4, 6, and 7, Rec. pp. 4-5). The decision of the Board of Tax Appeals allowed a partial abatement of the tax on grounds not at issue in this appeal, but was against the other contentions of the appellant and in favor of the validity of said chapter 63 (Rec. pp. 28-31). From this decision the appellant appealed to the Supreme Judicial Court pursuant to the provisions of G.L. c. 58A, sec. 13 (App. pp. 35-38), assigning as error the conclusions of the Board of Tax Appeals that said chapter 63 applied to the business of the appellant and that as so construed it was valid and not in violation of the Constitution of the United States (Claim of Appeal, Assignment of Errors 1, 2, 3, and 4, Rec. pp. 31-32).

The opinion of the Supreme Judicial Court (Rec. pp. 33-38) affirmed the decision of the Board of Tax Appeals and was likewise in favor of the validity of said chapter 63. A final order in accordance with said opinion was entered December 3, 1935 (Rec. pp. 39, 40), and the application for appeal to this Court was presented December 11, 1935.

(*b*) *Findings of Fact.*

The facts in the case are stated in the "Findings of Fact" contained in the decision of the Board of Tax Appeals (Rec. pp. 25-28). The findings of the Board pertinent to the present appeal are as follows:

"The appellant is a foreign corporation, organized under the laws of Delaware. Its principal office is in Boston and it maintains sales offices in Boston and in Buffalo, New York. Its business is dealing in lumber at wholesale. It

duly filed an excise tax return for the year 1932. The commissioner found that the appellant had no net income derived from business carried on within the Commonwealth and determined the corporate excess employed within the Commonwealth to be $502,465. Accordingly he assessed to the appellant an excise in the amount of $2,512.33, which was paid on October 20, 1932. The appellant seasonably applied for an abatement, claiming that the tax was illegally assessed because its business in Massachusetts was exclusively interstate commerce, and that in computing the appellant's corporate excess employed within the Commonwealth the commissioner had wrongly included a portion of the value of certain securities owned by the appellant in its assets employed in business within the Commonwealth. The application was denied and notice of the commissioner's decision was given on May 3, 1933. The appellant then appealed to this board.

"The appellant's Boston office is used as the headquarters for salesmen who solicit orders in Massachusetts and other New England States and in a part of New York State, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory. Orders obtained by the salesmen from Boston are accepted at the Boston office and are filled from the appellant's distributing yard at Buffalo, New York, or from the mill of some subsidiary outside Massachusetts. Lumber is shipped directly from those points, always in carload lots, to the customer. Remittances from customers in the New England States are made to the Boston office. No stocks of lumber are kept in Massachusetts. The only tangible property in this State is office furniture and equipment and salesmen's automobiles. The appellant maintains bank accounts in Boston, New York City, Buffalo, Brooklyn and Toronto, Canada, the Boston account being the most active and next to the largest in

size. The Boston salesmen are paid from that account. The corporate books and records are kept in Boston, its treasurer is located there, and directors' meetings are held there. Dividends declared on the preferred stock of the appellant have been paid out of the Boston bank account, including two in 1931. No dividends have been paid on the common stock.

. . . . . .

"The appellant in its return reported the value of the shares of stock of its subsidiaries, at their book values, to be $1,246,788, the value of its other intangibles to be $1,839,221, and the value of its tangible assets employed in business within Massachusetts to be $7,682. The commissioner found that the fair value of the appellant's capital stock was $3,506,626 and that the value of the total assets was $4,187,748. He found that the value of all intangible assets was $3,086,009, including the stocks of subsidiaries, and that the value of tangible assets employed in business in Massachusetts was $7,682. In determining the value of the intangible assets employed in business within Massachusetts the commissioner followed Ruling 2505 of his Rules and Regulations, which provides: 'Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable to Massachusetts under the provisions of section 41 of the law bears to the total of said remainder.' The proportion so determined under section 41 was .19233. Applying this proportion to the total value of intangible assets, $3,086,009, the commissioner found the value of intangible assets employed in business within Massachusetts to be $593,532. Adding the value of the tangible assets so employed, $7,682, he found the value of the assets, both real and personal, employed in business within the Commonwealth to be $601,214. Applying the rule provided by G.L. c. 63, § 30,

cl. 4, he found the proportion of the fair value of the capital stock which the value of the assets employed in business within the Commonwealth bore to the value of the total assets to be $503,429, from which he deducted the value of motor vehicles amounting to $964, leaving $502,465 as the corporate excess employed within the Commonwealth. If in determining the value of intangible assets employed within the Commonwealth the value of the shares of subsidiaries had been omitted, and the proportion .19233 had been applied to the remaining $1,839,221, of intangible assets, the value of intangible assets employed in business within the Commonwealth would have been $353,737, and the corporate excess within the Commonwealth would have been $301,671.

"Upon these facts the appellant makes two contentions;* first, that it is engaged exclusively in interstate commerce and so was not subject to the excise, and, secondly, that in any event there should not have been included in the assets employed in business within the Commonwealth any part of the stock of its subsidiaries.

"We find, for the reasons stated in the opinion below, that the business done by the appellant in Massachusetts was not exclusively interstate commerce, but that it did some local business as well. We find that the appellant's shares of stock in its subsidiaries were not employed in any business within the Commonwealth, and that a fair determination of the value of the intangible assets so employed would have been reached by applying the proportion obtained in accordance with the commissioner's ruling to the value of the remaining intangible assets. Accord-

*The Board here leaves out contentions of appellant with reference to constitutionality of the tax. See Contentions of Law 3, 4, 6, and 7 (Rec. p. 5); also discussion of jurisdiction of Board of Tax Appeals, *infra*, p. 6.

ingly we find that the amount of the corporate excess employed within the Commonwealth was $301,671. The amount of the excise which should have been assessed is therefore $1,508.36, and the appellant is entitled to an abatement of $1,003.97."

(c) *The Massachusetts Board of Tax Appeals.*

The Massachusetts Board of Tax Appeals functions as a Court of original jurisdiction. G.L. c. 58A, sec. 7 (App. pp. 34-35). *J. G. McCrory Co. of Massachusetts* v. *Commissioner,* 1 Mass. B.T.A. 273. The decision of the Board is final as to findings of fact, but an appeal as to matters of law may be taken to the Supreme Judicial Court. G.L. c. 58A, sec. 13 (App. pp. 35-38). The Court upon determination of the appeal may make such order as such determination may require, including an order for costs. G.L. c. 58A, sec. 13 (App. pp. 35-38). The Board seems to have doubt of its authority to declare an act of legislature unconstitutional. In one of its early cases, *New England Southern Corporation* v. *Lowell,* 1 Mass. B.T.A. 542, 552, this authority was commented on as follows:

> "Whether it would be its [the Board's] duty in any case to declare an act of the legislature unconstitutional may be open to discussion, but we are clear that every doubt as to the validity of a statute must be resolved in its favor by the Board."

(d) *Analysis and Computation of the Tax.*

The tax in issue was assessed under G.L. (Ter. Ed.) c. 63, secs. 39-43 (App. p. 41). This statute levies a tax on foreign corporations based on income derived from business carried on within Massachusetts and "corporate excess" employed within Massachusetts. G.L. (Ter. Ed.) c.

63, sec. 39 (App. p. 41). In this case the appellant had no net income (page 1 of tax return, Rec. p. 10A), so the tax in issue is based solely on the "corporate excess" employed within Massachusetts. "Corporate excess employed within the commonwealth" is defined as "such proportion of the fair value of its [the corporation's] capital stock on the last day of the taxable year as the value of its assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date." G.L. (Ter. Ed.) c. 63, sec. 30 (4) (App. p. 38). The first step in the assessment of the tax is, therefore, to value the capital stock of the corporation. The next step is to determine the value of the assets of the corporation, both real and personal, employed in business within Massachusetts. The allocation of real estate and tangible personal property is, of course, based on its situs within and without Massachusetts. Intangible assets must, however, be allocated by some arbitrary means, and the statute does not provide any guide for this allocation. In the case at bar it was made pursuant to Ruling 2505 of the Commissioner's Rules and Regulations (Findings of Fact, Rec. p. 27, where Ruling 2505 is quoted at lines 26-32). This Ruling provides in effect that the allocation should be made on the same basis as the statute provides for the allocation of net income, and such allocation was held to be in conformity with the statute in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156, 161. This allocation provided by the statute (G.L. c. 63, sec. 38, App. pp. 38-41) is based on three factors which are given equal weight in allocating the net income and hence the intangible assets employed in business within Massachusetts. The first factor is based on the value of the corporation's tangible personal property situated within Massachusetts. As the value of such property is assigned directly as assets employed in

business within Massachusetts, its inclusion in this allocation merely gives it additional weight in the final determination of the tax. In the case at bar the effect of this factor was insignificant, as the average value of tangible personal property of the appellant within Massachusetts, consisting of office furniture and salesmen's automobiles, was only $8734 as against an average value of total tangible personal property of $1,557,400 (Table A of Tax Return, Rec. p. 100) and a total value of all assets of $4,187,748 (Findings of Fact, Rec. p. 27).

Substantially the entire tax assessed to the appellant in this case is, therefore, based on the second and third factors, which allocate a substantial portion of the intangible assets of the appellant as assets employed in business within Massachusetts. The second factor is based on wages, salaries, and commissions paid employees which are assignable to Massachusetts. The statute provides that wages, salaries, and commissions assignable to Massachusetts shall be "such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the Commonwealth" (G.L. (Ter. Ed.) c. 63, sec. 38 (5), App. pp. 39-40). By its terms it includes commissions paid a salesman resident in Connecticut who solicits orders for carload lots of lumber to be shipped direct from South Carolina, providing such salesman reports to the Boston sales office. No attempt is made to restrict the compensation of employees assignable to Massachusetts to such compensation of employees as are engaged in any business alleged to be intrastate commerce.

The third factor is based on gross receipts from sales assignable to Massachusetts. The statute provides that the gross receipts from business assignable to Massachusetts "shall be the amount of gross receipts for the taxable

year from (*a*) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the Commonwealth and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises'' (G.L. c. 63, sec. 38 (6), App. p. 40). By its terms it includes the sales of all lumber shipped into the New England States. These sales are all admittedly in interstate commerce (Opinion of Board of Tax Appeals, Rec. p. 29).

The computation of the allocating fraction on the basis of the foregoing three factors is shown in Table A, page 3 of the tax return filed by the appellant (Rec. p. 10C). This fraction was applied to total intangible assets of the appellant by the Commissioner to determine the portion employed in business in Massachusetts. The Board of Tax Appeals in computing the tax, however, reduced the total intangibles by the value of the stock of subsidiary corporations. Its computation, regardless of the intention of the statute, must have included a substantial portion, if not all, of the accounts receivable from customers in the New England States other than Massachusetts, as well as a substantial portion of the other intangible assets of the appellant. Having thus arbitrarily determined the intangible assets employed in Massachusetts, the tangible assets were added and the total became the value of assets employed in business in Massachusetts. This value became the numerator of a fraction whose denominator was the value of all assets, and this fraction was applied to the value of the capital stock of the appellant to determine the ''corporate excess'' employed in business within Massachusetts. This ''corporate excess'' was reduced by the value of salesmen's automobiles (taxed locally) and the tax of $5 per thousand was assessed on the balance.

As the computation of the tax is somewhat complicated and as the method is exactly the same as that in issue before this Court in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, the following computation is here presented following the form used in the opinion in that case. The figures used have been taken from the copy of the tax return of the appellant (Table A, p. 3, Rec. p. 10C) and the Findings of Fact of the Board (Rec. pp. 27-28).

Amount of Tax Measured by Net Income

Average value of tangible property in Massachusetts, $8,734. Divide this by average value of all tangible property, $1,557,400; multiply resulting fraction by $56,347 (1/3 of $169,043, net loss for year)	= $	314.80
Wages, salaries, etc., assignable to Massachusetts, $92,899. Divide this by amount of all wages, salaries, etc., $209,640; multiply resulting fraction by $56,347 (1/3 of $169,043, *supra*)	=	24,970.00
Gross receipts assignable to Massachusetts, $278,551. Divide this by gross receipts from all business, $2,172,110; multiply resulting fraction by $56,347 (1/3 of $169,043, *supra*)		7,226.00
Net loss assignable to Massachusetts		$32,510.80
Total according to income		None

Amount of Tax Measured by Corporate Excess

Loss assignable to Massachusetts, as above shown, $32,510.80. Divide this by $169.043 (entire apportionable net loss); multiply resulting FRACTION* by $1,839,221 (used for

*Fraction of .19233 stated in Findings of Fact as being computed in accordance with provisions of section 41 (App. p. 41).

total intangible assets). This yields $353,737, which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $7682, were added and $361,419 became the total accepted value of assets assignable to the state.

Cash value of the company's capital stock was fixed at $3,506,625; all assets, $4,187,748. Divide $361,419 by $4,187,748; multiply resulting fraction by $3,506,625; the result is $302,635. From this the value of motor vehicles in Massachusetts of $964 was deducted, leaving $301,671—the "corporate excess." Five dollars per thousand upon this is $1508.36.

Total assessment for 1932 $1508.36

The important deductions from the foregoing analysis and computation of the tax, which will be referred to in the argument, are that the yardstick used to measure the tax has made no attempt whatsoever to differentiate between interstate commerce and that which is alleged to be intrastate commerce; that the amount of tax exacted is increased directly by interstate commerce; and that the net result is the taxation of accounts receivable and other intangible assets of the appellant which are not within the jurisdiction of Massachusetts.

Specification of Errors.

1. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to the appellant, by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would not be in violation of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States.

2. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts was applicable to the appellant, by reason of which it has in effect held that said tax may be imposed on a foreign corporation engaged exclusively in interstate commerce within the Commonwealth of Massachusetts and that such construction would not be in violation of the 14th Amendment to the Constitution of the United States.

3. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the appellant adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts, by reason of which it has in effect held that said tax may be imposed on the interstate business of a foreign corporation and that such construction would not be in violation of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States.

4. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding and deciding that the method of allocating the intangible assets of the appellant adopted by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts was a reasonable method of allocating the value of said intangible assets for the purpose of the tax imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts, by reason of which it has in effect held that the said tax may be imposed on property of a foreign corporation situated without the limits of the Commonwealth of Massachusetts and that such construction would not be in violation of the

14th Amendment to the Constitution of the United States.

5. In said suit there was drawn in question the validity of chapter 63 of the General Laws of the Commonwealth of Massachusetts on the ground that it was repugnant to the Constitution of the United States in that it levied a tax that is a direct burden on interstate commerce in contravention of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute, which decision is hereby assigned as error.

6. In said suit there was drawn in question the validity of chapter 63 on the ground that it was repugnant to the Constitution of the United States in that it levied a tax against property situated without the limits of the Commonwealth of Massachusetts in contravention of the 14th Amendment to the Constitution of the United States, and the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was in favor of the validity of said statute which decision is hereby assigned as error.

Summary of Argument.

1. The appellant, to the extent which it was carrying on business in Massachusetts, was engaged exclusively in interstate commerce and was not subject to the excise imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding otherwise.

This issue is presented on account of the construction placed on the decision of this Court in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, by the Supreme Judicial Court in *W. & J. Sloane* v. *Commonwealth*, 253 Mass. 529, 535. In the latter case the Supreme Judicial

Court held in effect that the Massachusetts Legislature could not have intended to enact a tax law which would be in violation of the United States Constitution and that the Supreme Judicial Court itself erred in construing the statute as applying to a foreign corporation engaged exclusively in interstate commerce in Massachusetts. The present state of the law in Massachusetts is, therefore, that the excise imposed by chapter 63 of the General Laws, regardless of its terms, does not apply to a foreign corporation engaged exclusively in interstate commerce within Massachusetts. The Supreme Judicial Court has held the appellant to be engaged in intrastate commerce within Massachusetts on the authority of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147, notwithstanding the construction placed on the decision in that case by this Court in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, 565-566. It is submitted that the case at bar is indistinguishable from *Ozark Pipe Line Co.* v. *Monier* (*supra*) and that the Supreme Judicial Court erred in holding the excise imposed by chapter 63 of the General Laws applied to the business of the appellant.

II. The imposition of the excise imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that the appellant is denied the rights and privileges assured to it therein and in that the said excise so assessed against the appellant is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

The tax in issue is a privilege tax laid directly on the operations of the business, and is not a tax laid upon a franchise emanating from the power of the state. If the

tax is not paid, an injunction may be obtained restraining the further prosecution of business by the corporation in Massachusetts.

Adopting, for the purpose of argument, the theory of the Massachusetts Supreme Judicial Court that the appellant was engaged in some local business, it does not follow that the tax imposed is valid. It must appear that a reasonable effort has been made to differentiate between state and interstate commerce and to tax only the former.

Looney v. *Crane Co.*, 245 U.S. 178.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.
Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113.
Hump Hairpin Co. v. *Emmerson*, 258 U.S. 290.
Alpha Portland Cement Co. v. *Massachusetts*, 268 U.S. 203.
Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

The amount of tax exacted must not be increased by the interstate business done.

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

The apportionment of the tax base in the case at bar is clearly an attempt to tax interstate commerce under the guise of taxing intrastate business. No reasonable effort has been made to separate state from interstate business, and the amount of tax exacted increases directly with the amount of gross receipts from sales all admittedly made in interstate commerce.

III. The imposition of the tax imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that it levies a tax

upon the property of the appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the appellant of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

Although the tax has been construed as an excise tax (*Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass. 47, 51; *Alpha Portland Cement Co.* v. *Commonwealth*, 244 Mass. 547, 548), where the corporation has no net income and the value of the corporate franchise is less than the book value of its assets after deducting liabilities, as in the case at bar, the tax is in substance a tax on the property of the corporation. Even if so construed, the tax is invalid, as the method of apportioning the assets does not purport to be an allocation of assets over which Massachusetts has jurisdiction to levy a property tax. The apportionment here results in the inclusion of accounts receivable due from residents of other states and a portion of the other intangible assets of the appellant. Such property is outside the jurisdiction of Massachusetts and is not subject to tax.

Union Tank Line Co. v. *Wright*, 249 U.S. 275, 282.

The tangible property situated within Massachusetts and any other property subject to the taxing jurisdiction of Massachusetts can be ascertained accurately. There is no need for a complicated allocation. The only reason an apportionment is ever allowed is to ascertain the real value of assets within the state.

Wallace v. *Hines*, 253 U.S. 66.

ARGUMENT.

I. The appellant, to the extent which it was carrying on business in Massachusetts, was engaged exclusively in interstate commerce and was not subject to the excise imposed by chapter 63 of the General Laws of the Commonwealth of Massachusetts. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in holding otherwise.

The excise imposed by chapter 63 of the General Laws was held to be in violation of the Constitution of the United States by this Court when imposed on a foreign corporation admittedly engaged exclusively in interstate commerce within Massachusetts in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203. The effect given this decision in Massachusetts is stated by the Massachusetts Supreme Judicial Court in *W. & J. Sloane* v. *Commonwealth,* 253 Mass. 529, 533, as follows:

> "The decisions of this court in the Alpha Portland Cement Company cases in 244 Mass. 530, and 248 Mass. 156, were wrong in holding that the excise could be levied upon corporations doing exclusively an interstate business within the Commonwealth. Those decisions attempted to extend the excise statute into a field to which it was not applicable. The ground for those decisions was the view, then entertained but now held to be erroneous in 268 U.S. 203, that the statute so interpreted would not offend any provision of the Federal Constitution. It was said that the words of the statute as a matter of verbal construction were broad enough to include such corporations. But the principle was recognized that the intention ought not to be imputed to the Legislature to enact an unconstitutional statute, provided the statute could be con-

strued as applicable to matters within its constitutional power if that seemed in harmony with the general purpose of the Legislature."

The tax assessed to the appellant in this case was assessed under the same statute and by the same formula as was used in the Alpha Portland Cement Company case (Analysis and Computation of the Tax, *supra,* pp. 6-11). Therefore, if the appellant is held to be engaged exclusively in interstate commerce, that is the end of the case, as the excise imposed by chapter 63 does not apply. The Supreme Judicial Court has held that the appellant was not engaged exclusively in interstate commerce in Massachusetts and grounded its decision on the case of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147. The reasons for this decision are stated in the opinion (Rec. p. 34) as follows:

"The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there. These are corporate functions which are not interstate commerce. That this constituted local and intrastate business which subjected the foreign corporation to the excise tax of this Commonwealth seems to us to be settled by the decision in Cheney Brothers Co. v. Massachusetts, 246 U.S. 147."

The Supreme Judicial Court has here placed the same construction on the Cheney Brothers Company decision as was placed on it by District Judge Valkenburgh in *Ozark Pipe Line Co.* v. *Monier* (reversed in 266 U.S. 555), and in almost identical language. In his opinion (Transcripts of Records and File Copies of Briefs, vol. 35, Case No. 181, Rec. pp. 43-44) District Judge Valkenburgh said:

"The Attorney General in his brief fairly recites the nature of the business transacted by complainant in this state. For the sake of brevity I quote the language of the brief upon this point . . . 'The vice-president, secretary, treasurer and other officers maintain their offices and headquarters in their offices in St. Louis, where telephones are maintained and the name of the company appears on the doors of said offices. Stockholders and directors meetings are held there. All certificates for the receipt of oil for transportation are sent to the St. Louis office where the revenue for said transportation is figured and entered of record. The tariff rates are also kept there and in fact the entire business of the corporation is managed and directed from the Missouri office.

" 'This statement is not traversed and is not susceptible of contradiction in any substantial particular. . . . ' In my opinion, this case falls within the spirit, if not the letter, of the decision of the Supreme Court of the United States in the cases of Copper Range Co. and Champion Copper Co. reported in Cheney Brothers Company v. Commonwealth of Massachusetts, 246 U.S. 147 . . . In my opinion, that case is decisive of this controversy under the testimony produced at the hearing."

The error of this construction of the Cheney Brothers Company case was clearly pointed out in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, 566, where, in reversing the decision of District Judge Valkenburgh, this Court said:

"The Court below grounded its decision chiefly upon *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147; but a review of that case will clearly demonstrate that it cannot be given the effect thus ascribed to it. Seven

foreign corporations sought to avoid a Massachusetts excise tax on the ground, among others, that, as imposed, it contravened the Commerce Clause of the Constitution. This court held the tax invalid as to one of the corporations and sustained it as to the other six. The first of the six kept a stock of machine parts in the state which were sold both within and without the state, and the court simply held that the portion of the business which was purely local was subject to local taxation. The second did an extensive local business in repairing cars of its own make and in selling secondhand cars. The third employed salesmen who took orders for its product from local retailers and turned them over to be filled by the nearest wholesaler, and this amounted, as the court said, simply to one local merchant buying from another. The fourth and fifth were mining companies operating mines in Michigan with offices in Boston where their directors met, declared and paid dividends, etc. Interstate commerce was not affected. Indeed, it does not affirmatively appear that there was any such commerce to be affected. . . . It will thus be seen that there is nothing in this decision upon which the decree under review can properly rest. Its effect is entirely the other way."

The Supreme Judicial Court has attempted to distinguish the case at bar from the Ozark Pipe Line Company case on the following facts (Rec. pp. 36-37):

"It does not appear that its directors' meetings were held in Missouri, that its treasurer was located there, or that its dividends were paid there. The court in its opinion stressed the fact that the corporate activities at the Missouri office of the corporation were solely in furtherance of interstate transportation of oil in the pipe line."

The opinion of the trial judge (*supra,* p. 19), however, shows that not only the directors' meetings but also the stockholders' meetings were held in Missouri and that the treasurer's office was located there. It does not appear affirmatively that dividends were paid in Missouri, but all the corporation's bank accounts were there and it seems fair to infer that dividends were paid from these bank accounts if paid at all. If the corporate functions employed within Missouri by the Ozark Pipe Line Company were solely in furtherance of interstate commerce, it would seem that the corporate functions of the appellant employed within Massachusetts were, *a fortiori,* in furtherance of interstate commerce. The corporate life of the Ozark Pipe Line Company was far more centered in Missouri than that of the appellant in Massachusetts. There does not seem to be any fundamental difference between the interstate transportation of oil and the interstate transportation of lumber.

In view of the similarity between the case at bar and the Ozark Pipe Line Company case, it does not seem necessary to review the former decisions of this Court with reference to what constitutes interstate commerce. All the business of the appellant, with the exception of the exercise of the corporate functions referred to by the Supreme Judicial Court (*supra,* p. 18), is admittedly interstate commerce. It is this interstate business which gave value to the "corporate excess" which has been taxed. It should be pointed out, also, that the taxing statute involved in the case of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147, was radically different from that in the case at bar. There no attempt was made to allocate a taxable value to Massachusetts on the basis of interstate business. As this Court said in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, 566: "Interstate Commerce was not affected. Indeed it does not ap-

pear affirmatively that there was any such commerce to be affected."

The opinion of the Supreme Judicial Court has quoted from a dissenting opinion by Justice Brandeis in the case of *Cudahy Packing Co.* v. *Hinkle,* 270 U.S. 460, 468, in support of its construction of *Cheney Bros. Co.* v. *Massachusetts,* 246 U.S. 147. It seems clear, however, that the comments of Justice Brandeis are directed to the portions of the Cheney Brothers Company decision referring to corporations which made sales from stocks of merchandise in Massachusetts, as the Cudahy Packing Company made such sales in the taxing state and its principal office was not located there. There is nothing in either opinion in the Cudahy Packing Company case which places any construction on the portions of the Cheney Brothers Company case dealing with the Champion Copper Company and the Copper Range Company which differs or conflicts with the construction in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, quoted above. The questions involved were not in issue.

II. The imposition of the excise imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that the appellant is denied the rights and privileges assured to it therein and in that the said excise so assessed against the appellant is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the Commerce Clause embodied in section 8 of article I of the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

The tax in issue is a privilege tax laid directly on the operations of the business and is not a tax laid upon a fran-

chise emanating from the power of the state. It is defined in the opinion of the Massachusetts Supreme Judicial Court (Rec. pp. 34-35) as "an excise for the commodity or privilege of having a place for the transaction of intrastate business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto." The only business of the appellant held to be intrastate business was (Rec. p. 35): "The principal office of the taxpayer was in Boston. Its most active bank account was there. Corporate books and records were kept there; the location of its treasurer with all its implications was there; the dividends were paid and the meetings of its directors were held there." It is therefore for the commodity or privilege of exercising these corporate functions that the tax is imposed in this case. If the tax is not paid, an injunction may be obtained restraining the further prosecution of business by the corporation within Massachusetts (G.L. (Ter. Ed.) c. 63, sec. 75, App. pp. 41-42).

Adopting, for the purpose of argument, the theory of the Supreme Judicial Court, that such functions constitute local business subject to the taxing jurisdiction of Massachusetts, it does not follow that the tax imposed on the appellant is valid. It must appear that a reasonable effort has been made to differentiate between state and interstate commerce and to tax only the former.

Looney v. *Crane Co.*, 245 U.S. 178.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.
Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113.
Hump Hairpin Co. v. *Emmerson*, 258 U.S. 290.
Alpha Portland Cement Co. v. *Massachusetts*, 268 U.S. 203.
Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

The amount of tax exacted must not be increased by the interstate business done.

Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384.

These limitations on the right of a state to tax a foreign corporation engaged in both interstate and foreign commerce are pointed out in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, where, at page 218, this Court said:

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U.S. 68, 87, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved.
>
> "*Union Tank Line Co.* v. *Wright*, 249 U.S. 275, 282, *et seq.*, pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a State. We there declined to follow the rule applied in *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 26, and held that determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

> "The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the State is taxed. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well-established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State."

The rule for applying these former decisions to alleged similar cases is stated in *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555, 562, as follows:

> "an extended review of the decisions of this court dealing with this phase of the subject is not necessary. All proceed from the same principles, but range themselves on one side or the other of the line as the facts do or do not demonstrate that the tax as a practical matter constitutes a burden on interstate commerce. The facts upon which these former decisions rest, therefore, must be borne in mind in applying them to other and alleged similar cases. If the business taxed is in fact separate local business, not so connected with interstate commerce as to render the tax a burden on such commerce, the tax is good."

In the case of *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U.S. 203, the same statute was in issue and the tax was computed by the same formula as in the case at bar. The facts stated in the opinion with reference to the business conducted by the Alpha Portland Cement Company in Massachusetts are almost identical with the findings of fact of the Board of Tax Appeals in this case, with the ex-

ception of the exercise of certain corporate functions by the appellant which are necessary for its existence as a corporation but which are not "business" in the sense of activities which produce or are expected to produce income or profit to the corporation. The exercise of the same functions by a foreign corporation, otherwise engaged exclusively in interstate commerce within the state, was held to be solely in furtherance of its interstate business and not subject to an excise tax in *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555.

It would seem that these two decisions definitely disposed of the case at bar unless the method of apportioning the tax in this case is peculiarly adapted to separate the value of the exercise of such corporate functions from the interstate business of the appellant or the application of these decisions has been restricted by later decisions of this Court.

An examination of the basis of the tax, however, discloses that it is clearly an attempt to tax interstate commerce under the guise of taxing intrastate business. The appellant had no net income, so the tax on income is not at issue. The base of the tax is the "corporate excess." As has been pointed out (Analysis and Computation of the Tax, *supra*, pp. 6-11), the portion of the "corporate excess" assigned to Massachusetts is substantially all based on the apportionment of intangibles to Massachusetts in accordance with the statutory method for the allocation of net income. This method of allocating intangibles was held to be in conformity with the statute in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156, 161. The mere fact that the method of allocation is the same as was used in that case, where the corporation was admittedly engaged exclusively in interstate commerce, seems to prove conclusively that it is directed toward measuring the commodity or privilege of maintaining an office by the appellant to be

used "as the headquarters for salesmen who solicit orders in Massachusetts and other New England States and in a part of New York State, and for carrying on correspondence and other business activities in connection with the receipt of orders and shipment of goods for that territory" (Findings of Fact, Rec. p. 26), and not toward measuring the commodity or privilege of exercising the corporate functions found by the Supreme Judicial Court to be the sole intrastate business of the appellant.

If the apportionment of the tax base is analyzed more closely, it will be found that the only two factors having any substantial effect on the tax are the gross receipts of the appellant from sales made in the New England States and a portion of New York State and the salaries, wages, and commissions paid to employees who are not employed by any other office of the appellant. The gross receipts from sales were found by the Board of Tax Appeals to have been all from interstate commerce (Rec. p. 29). Unquestionably a tax assessed directly on such receipts would be invalid. In the recent case of *Matson Navigation Co. et al.* v. *California* (No. 346, October Term, 1935, Opinion delivered March 2, 1936), this Court said: "our decisions demonstrate that a state tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the Commerce Clause." It is submitted that the utilization of such earnings in apportioning any substantial part of the tax base is equally a burden on interstate commerce. The use of this factor also violates the test recently laid down in *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U.S. 384, in these words:

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the inter-

> state business done, that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

It is clear from the computation of the tax (*supra*, pp. 6-11) that the amount of tax is increased substantially by apportioning a part of the "corporate excess" on the basis of interstate sales. It is also clear that the tax is not imposed solely on account of intrastate business, as interstate sales are not in any way a fair measure of the value of the commodity or privilege of exercising the corporate functions which have been held to be intrastate commerce. (The Supreme Judicial Court of Massachusetts apparently failed to recognize the effect of this factor of apportionment when it said: "The excise here assailed conforms to the test recently laid down in *Cooney* v. *Mountain States Telephone & Telegraph Co.*" (Rec. p. 38).)

The only other factor of apportionment having any substantial effect on the tax is that of wages, salaries, and commissions. Here undoubtedly a portion of the wages and salaries paid are attributable to the corporate functions which have been held to be intrastate commerce, but the statute does not limit the factor to such wages and salaries although the amount would be readily ascertainable with absolute accuracy. It includes commissions paid a resident of Connecticut for negotiating the sale of a carload of lumber, which is shipped direct from South Carolina, and commissions and wages paid all other employees engaged in interstate commerce. By the inclusion of such wages, salaries, and commissions this factor also violates the test laid down in *Cooney* v. *Mountain States Telephone & Telegraph Co.* (*supra*) for the same reasons as the factor of gross receipts.

The opinion of the Supreme Judicial Court does not attempt to justify the apportionment of the tax base as a reasonable effort to differentiate state from interstate commerce, such as was held valid in *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113, and *Hump Hairpin Co.* v. *Emmerson,* 258 U.S. 290. This question is disposed of by stating (Rec. p. 37): "It [the tax] is based upon that proportion of its tangibles and intangibles deemed to be employed in this Commonwealth. The effect upon interstate commerce is at most incidental and remote." The case of *Virginia* v. *Imperial Coal Sales Co., Inc.,* 293 U.S. 15, is cited as authority for this conclusion. An examination of that case discloses that this Court was there concerned with an ad-valorem property tax on a domestic corporation. It was said, at page 19:

> "Respondent is a domestic corporation with its principal office in that State where the proceeds of its accounts receivable are collected and deposited in bank. Such credits and accounts are regarded as situated at the domicile of the creditor and that domicile establishes a basis for taxation"—

and, at page 20:

> "We are dealing, as we have said, with an ad valorem property tax, and not with a privilege tax. Respondent is not taxed upon the privilege of engaging in interstate commerce, and decisions cited by the state court are not opposite. Thus, in Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, the tax was held to be bad as one imposed 'upon the privilege or right to do business' of a corporation engaged only in interstate commerce. *Id.,* p. 562. The same principle of protection was applied in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203, 216."

It is difficult to see how this decision can be given the effect ascribed to it by the Supreme Judicial Court.

An examination of the other recent decisions of this Court also fails to disclose any modification of the well-established principles stated in *Ozark Pipe Line Co.* v. *Monier,* 266 U.S. 555, and *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U.S. 203.

In *Hans Rees' Sons, Inc.,* v. *North Carolina,* 283 U.S. 123, a tax was held invalid because it did not make a reasonable effort to differentiate state from interstate commerce and tax only the former.

In *Angelo Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U.S. 218, a state tax was held invalid when imposed on the franchise of a foreign corporation engaged exclusively in interstate commerce and based on the value of tangible property within the state. In a dissenting opinion, Justice Cardoza qualified the decision in *Ozark Pipe Line Co.* v. *Monier* by saying, at page 236: "The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the State." This qualification would not affect the case at bar, however, as the tax is not a franchise tax (Rec. p. 34) and the appellant did not derive its franchise from Massachusetts. In the same dissenting opinion, at page 237, the tax in the statute under review in that case was distinguished from the tax involved in the case at bar in these words:

> "*Alpha Portland Cement Co.* v. *Massachusetts,* 268 Mass. 203, dealt with a statute of Massachusetts, different in form from this, and interpreted as one laid directly on the operations of the business."

In *Matson Navigation Co. et al.* v. *California* (No. 346, October Term, 1935, Opinion delivered March 2, 1936) it was held that a franchise tax imposed on a domestic corporation, where a portion of the tax base included net in-

come from interstate and foreign commerce attributable to the state granting such franchise, was valid. The corporation was engaged in both intrastate (other than maintaining a principal office, etc.) and interstate commerce, and it was carefully pointed out that it was the franchise granted by the state, including the right to be a corporation empowered to do business in corporate form in accordance with California law, which was being taxed.

III. The imposition of the tax imposed by chapter 63 of the General Laws upon the appellant is in violation of the Constitution of the United States in that it levies a tax upon the property of the appellant situated without the limits of the Commonwealth of Massachusetts, thereby depriving the appellant of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States. The Supreme Judicial Court erred in holding otherwise.

The tax in issue has been consistently construed as an excise tax and not a property tax.

Judson Freight Forwarding Co. v. *Commonwealth,* 242 Mass. 47, 51.

W. & J. Sloane v. *Commonwealth,* 253 Mass. 529, 532.

Carlos Ruggles Lumber Co. v. *Commonwealth,* 261 Mass. 450, 452, 453.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U.S. 203, 213-216.

In the case at bar, however, the corporation had no net income (Tax Return, Rec. p. 10A). The net book value of its assets after deducting its liabilities is greater than the total value placed on its corporate franchise (Tax Return, Rec. p. 10B, Table IV and Findings of Fact, Rec. p. 27).

The tax is, therefore, in substance a tax on property. The method of allocating the intangible assets of the appellant to Massachusetts has already been pointed out (Analysis and Computation of Tax, *supra*, pp. 6-11). The right to tax tangible property situated in Massachusetts and credits due from residents of Massachusetts is not involved. The method of allocation does not purport to allocate such credits. Its intention is clearly to allocate intangible assets on the basis of sales made in all the New England States and a portion of New York State, and two other factors which bear no relationship to credits due from Massachusetts residents. The basis of the allocation clearly shows that credits due from residents of the New England States, other than Massachusetts, and from residents of New York State have been included as property subject to tax.

The proposition that a state cannot tax property outside its jurisdiction will hardly be questioned. It is stated by this Court in *Union Tank Line Co.* v. *Wright*, 249 U.S. 275, 282, as follows: "A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the fourteenth Amendment." The value of tangible property and credits due from residents of Massachusetts (which the Supreme Judicial Court asserts are subject to taxation in Massachusetts in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156) may be ascertained with absolute accuracy. There is no need for a complicated apportionment. "The only reason an apportionment is ever allowed is to ascertain the real value of assets within the State" (*Wallace* v. *Hines*, 253 U.S. 66).

The Supreme Judicial Court states in its opinion (Rec. p. 38) that "The taxpayer cannot upon this record question the allocation made by the defendant," and cites its former decision in *Alpha Portland Cement Co.* v. *Commonwealth*, 248 Mass. 156. As the portion of the opinion in that case

dealing with the right of the Alpha Portland Cement Company to question the allocation was concerned with a procedural question not pertinent to appeals prosecuted before the Board of Tax Appeals, it is not quite clear what the Court means. The appellant concedes that it cannot attack the method of allocation as not being in conformity with the statute. The Supreme Judicial Court has already held that it is in conformity with the statute when applied to a corporation admittedly engaged exclusively in interstate commerce (*Alpha Portland Cement Co.* v. *Commonwealth,* 248 Mass. 156). Its determination of the legislative intent is final. The appellant does not concede, however, that there is any defect in the record which prevents it from attacking the allocation made by the Board of Tax Appeals, in revising the assessment made by the Commissioner, as the step in the determination of the tax which makes the tax invalid as a violation of the Due Process Clause of the 14th Amendment or as a direct burden on interstate commerce.

Wherefore, on account of the errors hereinbefore assigned, the appellant prays that the said order of the Supreme Judicial Court of the Commonwealth of Massachusetts dated the 3d day of December, 1935, in the above-entitled cause, in so far as it denies the abatement of the entire tax assessed to the appellant under chapter 63 of the General Laws of the Commonwealth of Massachusetts, be reversed and an order be entered in favor of this appellant.

Respectfully submitted,

ROBERT C. McKAY,
Attorney for Appellant.

APPENDIX.

Chapter 58A, General Laws (Ter. Ed.), as Amended by Acts 1933, c. 321 and c. 350.

Section 7. Any party taking an appeal to the board from a decision or determination of the commissioner or of a board of assessors, hereinafter referred to as the appellee, shall file a petition with the clerk of the board of tax appeals and serve upon said appellee in the manner provided in section nine a copy thereof. Where two or more parcels of real estate are included in one decision of a board of assessors, the board of tax appeals in its discretion may require that each parcel be the subject of a separate petition. The commissioner shall forthwith furnish a copy of each such petition served upon him to the attorney general. The petition upon such appeal shall set forth specifically the facts upon which the party taking an appeal, hereinafter called the appellant, relies, together with a statement of the contentions of law which the appellant desires to raise. The appellant shall state upon the petition the address to which service of any pleading, motion, order, notice or process in connection with the appeal can be made upon him. Within such time as the board by its rules may prescribe, the appellee shall file with the board an answer stating fully each finding of fact and ruling of law made with respect to the tax or determination in issue and denying or admitting each and every allegation of fact contained in the petition; except that, in an appeal under section sixty-four or sixty-five of chapter fifty-nine, if the appellee desires to raise no issue other than the question whether there has been an overvaluation of the property on which the tax appealed from was assessed, no answer need be filed. If no answer is filed in such a case, the allegation of overvaluation of such property shall be held to be denied and all other material facts alleged in the petition admitted. If an answer is filed

a copy shall be served upon the appellant, in the manner provided in section nine. The party taking the appeal shall at the time of filing the petition pay an entry fee of ten dollars for each appeal from a decision of the commissioner or, in the case of an appeal from a decision of a board of assessors, an entry fee equal to ten cents on each one thousand dollars of the assessed value of that portion of the real estate or personal property, or both, the tax on which is sought to be abated, except that the minimum entry fee shall be five dollars. The board shall not consider, unless equity and good conscience so require, any issue of fact or contention of law not specifically set out in the petition upon appeal or raised in the answer. At any time before the decision upon the appeal by the board or by the supreme judicial court on appeal under section thirteen, the appellee may abate the tax appealed from in whole or in part or change his or its determination.

SECTION 13. The board shall make a decision in each case heard by it and may make findings of fact and report thereon in writing. Except in cases heard under the informal procedure authorized by section seven A, the board shall make such findings and report thereon if so requested by either party within ten days of a decision without findings of fact. Such report may, in the discretion of the board, contain an opinion in writing, in addition to the findings of fact and decision. All reports, findings and opinions of the board and all evidence received by the board, including a transcript of any official report of the proceedings, shall be open to the inspection of the public; except that the originals of books, documents, records, models, diagrams and other exhibits introduced in evidence before the board may be withdrawn from the custody of the board in such manner and upon such terms as the board may in its discretion prescribe. The decision of the board shall be final as to

findings of fact. From any decision of the board upon an appeal from a decision or determination of the commissioner, or of a board of assessors, except decisions of the board under sections twenty-five and twenty-six of chapter sixty-five, an appeal as to matters of law may be taken to the supreme judicial court by either party to the proceedings before the board who has not waived such right of appeal. A claim of appeal shall be filed with the clerk of the board within twenty days after the date of the decision of the board, or within twenty days after the date of a report of findings of fact, if such report is made on request of a party after the decision; and within twenty days thereafter, or within such further time as the board may allow, the appealing party shall enter the appeal in said court, in the county where either party lives or has his usual place of business or in Suffolk county, and shall file with the clerk of said court a copy of the record before the board, shall serve by registered mail upon the adverse party a copy of the claim of appeal and a notice that he has entered said appeal and shall file an affidavit of such service with said clerk. The record in such an appeal shall include copies of the following:—the tax returns and lists, if any, filed by the taxpayer, so far as material to the controversy, the original assessment or other original determination in issue, so far as material, the application for abatement or other petition filed with the commissioner or with the board of assessors and the decision or determination thereon, the petition upon appeal to the board, the answer to the petition and other pleadings, if any, filed with the board, the report and findings of the board including any opinions filed, all requests for rulings of law and findings of fact and the disposition of each by the board, the claim of appeal to the supreme judicial court and such portion of any official report of the proceedings before the board as may be necessary for the consideration of any question of law raised

before the board, which it is alleged that the board has erroneously decided. Each claim of appeal shall set out separately and particularly each error of law asserted to have been made by the board, with precise references to the portions and particulars of the proceedings before the board in which it is alleged that error of law occurred. Upon the entry of the appeal it shall be heard and determined by the full court. Within ten days from the entry of the appeal in the supreme judicial court the appealing party shall give the clerk of said court an order in writing to print the record filed with him and the affidavit of service for transmission to the full court, and, thereupon, in the manner provided in the second paragraph of section one hundred and thirty-five of chapter two hundred and thirty-one for carrying questions of law to the full court, the expense shall be estimated, notified to and paid by the appealing party, said record shall be printed and, together with any original papers, transmitted to the full court, and said appeal shall be entered on the docket of the full court. The court shall not consider any issue of law which does not appear to have been raised in the proceedings before the board. The court upon determination of the appeal may make such order as such determination may require including an order for costs. Upon the entry of such order, with or without an order for costs, a copy thereof shall be transmitted by the clerk of said court to the clerk of said board. If the order grants an abatement of a tax assessed by the commissioner or by the board of assessors of a town and the tax has been paid, the amount abated with interest at the rate of six per cent per annum from the time when the tax was paid but, in case of a tax assessed under chapter sixty-two, not from a time earlier than October first of the year in which the return of income subject to said tax was required to be filed, and, if costs are ordered against the commissioner or against a board of assessors, the amount

thereof, shall be paid to the taxpayer by the state treasurer or by the town treasurer, as the case may be, and, if unpaid in the latter case, execution therefor may issue against the town as in actions at law. If costs are ordered against a taxpayer execution shall issue therefor. The appeal to the supreme judicial court under this section shall be the exclusive method of reviewing any action of the board, except action under sections twenty-five and twenty-six of chapter sixty-five. For want of prosecution of an appeal in accordance with the provisions of this section the board, or, if the appeal has been entered in the supreme judicial court, a justice of that court, may dismiss the appeal. Upon dismissal of an appeal the decision of the board shall thereupon have full force and effect.

CHAPTER 63, GENERAL LAWS (TER. ED.).

SECTION 30. . . .

4. "Corporate excess employed within the commonwealth" by a foreign corporation, except as hereinafter provided, [shall mean] such proportion of the fair value of its capital stock on the last day of the taxable year as defined in paragraph numbered six of this section, as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following on such date.

SECTION 38. . . .

2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

(*a*) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated

within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

(*b*) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employees.

(*c*) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected

with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (*a*) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (*b*) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

7. If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another state.

8. In the case of consolidated returns of net income, the commissioner shall allocate such income, so far as practicable, in accordance with the above rules.

9. A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditure of a

corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth.

SECTION 39. Except as otherwise provided herein, every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair value of its capital stock as the assets, both real and personal, employed in any business within the commonwealth on the day fixed for determination of the value of the corporate excess employed within the commonwealth bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth. . . .

SECTION 41. . . .

If a foreign corporation carries on any business outside this commonwealth, the remainder of the net income shall be allocated as provided in paragraphs 2 to 9, inclusive, of section thirty-eight.

SECTION 75. In addition to the methods provided by sections seventy-two and seventy-three, taxes under this chapter may be collected by an information brought in the supreme judicial court by the attorney general at the relation of the commissioner. The court may issue an injunction upon such information, restraining the further prosecution of the business of the company, association or corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting

the provisions of section fifty-two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth.